

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANE L. KELLEY, et al.,)
) Case No. C07-475
Plaintiff,)
) Seattle, Washington
v.)
) August 7, 2007
MICROSOFT CORPORATION,)
)
)
Defendants.)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

For the Plaintiff: JEFFREY I. TILDEN, ESQ.
JEFFREY M. THOMAS, ESQ.
MARK ADAM GRIFFEN, ESQ.

For the Defendant: STEPHEN M. RUMMAGE, ESQ.
CASSANDRA L. KINDEAD, ESQ.

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Proceedings Recorded by Computer-aided Stenography.

1 SEATTLE, WASHINGTON; TUESDAY, JULY 7, 2007

2 4:14 P.M.

3 THE COURT: All right, Ms. Scollard, let's call the
4 case.

5 THE CLERK: CR07-475, Anne Kelley, et al, vs. Microsoft
6 Corporation. Counsel, please make your appearances.

7 MR. TILDEN: Jeff Tilden, Jeff Thomas and Mark Griffin
8 for the plaintiff. We have co-counsel behind the bar in the
9 courtroom as well.

10 MR. RUMMAGE: Steve Rummage, Your Honor, for defendant,
11 with Cassandra Kinhead.

12 THE COURT: Well, good afternoon. Counsel, I've had an
13 opportunity to read Microsoft's motion to dismiss, plaintiff's
14 amended complaint, I've read the Kelley opposition and I have
15 read the reply. I also was aware that you have stipulated the
16 fact that there will be no contract action, and so I thank you
17 for that and my clerks thank you for that. I did not read nor
18 have I worked up those sections.

19 So I understand that you are allowed 20 minutes per side
20 for argument, and I believe I'm ready to hear you. I really have
21 only one question for you, and that is the issue of standing.
22 And is the issue of whether or not this is a proper plaintiff who
23 has experienced all of the events appropriate to bring up in a
24 12(b)(6) motion, or should that be more properly reserved for
25 your certification motion.

1 MR. RUMMAGE: Thank you, Your Honor. Your Honor, I have
2 20 minutes as Your Honor just said, and I'd like to reserve five
3 minutes for rebuttal, if I could. And, in the 15 minutes that
4 remains, what I'd like to talk about are two main topics, the
5 second of which we'll get into the area that Your Honor just
6 asked about, that is the implications or the inaction really
7 between this motion and the class certification issues.

8 The first thing I want to talk about today, Your Honor,
9 is the Magnuson-Moss Warranty Act and explain where the
10 plaintiff's claim on that falls short. And that's a relatively
11 brief discussion. After that, Your Honor, I plan to talk about
12 the more fundamental flaw in the complaint as we see it, which is
13 that the plaintiff alleges the plaintiffs now, since they've
14 amended to add one, allege only that they bought PCs that had
15 Windows Vista Capable stickers on them but they don't allege any
16 other connection with Microsoft or any conduct of Microsoft. And
17 we believe that, as a result, the plaintiffs have not alleged
18 enough to show that they're entitled to relief under any of their
19 theories, and that the case ought to be dismissed. And I'll get
20 into that standing question.

21 So let's first talk about the Magnuson-Moss claim. It's
22 important, I think, to set the stage by realizing that that claim
23 is predicated entirely on three words. The claim is that the
24 words Windows Vista Capable which appear on a sticker on a PC are
25 a written warranty under the act. Now, we all agree, plaintiffs

1 and defendants both, that the act has three definitions for
2 written warranty, and there's only one that could conceivably
3 apply here, and that's the one that requires that the sticker --
4 any written warranty promise, and I quote, a specified level of
5 performance over a specified period of time. So the key here,
6 Your Honor, is that phrase Over a specified period of time.

7 And we think that the available authority -- and,
8 admittedly, there's not cascades of authority -- but the
9 available authority makes clear that that is a durational
10 promise. It is a promise that extends over a period of time.
11 When you look at the FTC regulation, what it says is that a
12 product information disclosure without a specified period of time
13 to which the disclosure relates is not a written warranty. And
14 that's at 16 CFR Section 700.3A. And then, when you look at the
15 only case that really talks about this with any substance, that's
16 the Skeleton case out of the Seventh Circuit, that court talks
17 about the distinction between what is and isn't a written
18 warranty under this provision and it makes the distinction that a
19 promise that a transmission will perform like a THM 350
20 transmission is not a warranty because it has no specified
21 duration of time. But the same promise for the life of the
22 transmission would be a warranty because it would be for a
23 specified period of time.

24 In this instance, those three words, Windows Vista
25 Capable, have no specified period of time to which they relate.

1 No duration to which they relate. The plaintiff's response to
2 this argument is not to stay that we're conceptually wrong, but
3 to say, Gee whiz, those three words have to have some temporal
4 content to them. And so what they say is that in fact what that
5 promise is is that at the time of the Windows Vista release this
6 PC will run Windows Vista. Well, Your Honor, that is not a
7 promise over a period of time, that is a promise at a period of
8 time, and speaks right to the distinction that the Seventh
9 Circuit makes in Skeleton. So there's no durational content to
10 those three words on that sticker, and that in our view, Your
11 Honor, is dispositive of the Magnuson-Moss claim.

12 THE COURT: Can it be for a moment in time? In other
13 words, when you set it up?

14 MR. RUMMAGE: I think not, Your Honor.

15 THE COURT: In other words, how long does the statute
16 require? Is it three moments, five moments, ten moments?

17 MR. RUMMAGE: I would say, Your Honor, if it said for
18 three minutes, that would be okay. And the reason why -- that
19 may sound absurd, Your Honor. And the Seventh Circuit says that,
20 Gee whiz, this may sound absurd, but they say it's important to
21 honor whatever is in the statute, because the consequences that
22 attach to that are not simply that you can have lawsuits like
23 this, but there are a whole raft of disclosures that you have to
24 have if it is a written warranty. And so people like Microsoft
25 or any other business has to know in a bright-line way, have I

1 just made a written warranty or not. Because if I do, if I have,
2 I need to go through all those things that the regulation
3 requires; interestingly, among them, a specification of a period
4 of time to which the warranty relates. And so I think applying
5 that bright line test, Your Honor, like it may seem like angles
6 dancing on a head of a pin, we get from one moment to three
7 moments, the reality is there has to be durational content. And
8 if it doesn't meet that test, those our obligations under the act
9 don't kick in.

10 As a matter of common sense, Your Honor, when one looks
11 at those three words, there's not a one of us, even lawyers
12 though we may be, and look at that sticker and say that's a
13 warranty under the Magnuson-Moss Warranty Act. It doesn't fit.
14 It's a square peg that they're trying to put into a round hole.

15 So, Your Honor, with that claim set aside for the
16 moment, I want to talk about the remaining issue, which we think
17 cuts across every one of the claims, cuts across the breach of
18 contract claim, though that's now disposed of, and that is the
19 deficiency in the claim that they have not alleged any connection
20 between the supposed misconduct of Microsoft and their own
21 damages for conduct.

22 I want to begin, Your Honor, with what the complaint
23 alleges. And I want to do it more in chronological order than
24 the complaint presents it, because I think it's important.

25 The first thing they allege, chronologically, is that in

1 May of 2006, Microsoft conceived of a marketing plan that was
2 going to tell people that if they bought a PC, even if it was
3 loaded with Windows XP, it would be capable of running Windows
4 Vista when it was released. They say that in March.

5 They then alleged in October of 2006, about the time
6 that program was implemented and still before either plaintiff
7 purchased a PC, they alleged that a Microsoft employee posted a
8 blog which they cite and describe in the their complaint. And,
9 in that blog, there is listed four different versions of Vista,
10 and the gentleman explains that these two versions of Vista are
11 good for home users, and these two versions of Vista are good for
12 business users, and if you want a premium experience look for a
13 Windows Premium Ready sticker or certification or description on
14 the computer. They allege that in their complaint.

15 Then they allege that the next month, in November of
16 2006, the following. In November 2006, Ms. Kelley purchased a PC
17 to which a Windows Vista Capable sticker was affixed. The PC she
18 purchased was not designated as Premium Ready, period full stop.
19 The only allegation in the complaint about Ms. Kelley. She does
20 not allege that she read the sticker. She does not allege that
21 she knew anything about what the sticker meant. She doesn't
22 allege that she knew anything about Premium Ready PCs. She
23 doesn't allege anything about whether she read or had any
24 background information about the PCs before she bought the
25 particular one she bought. She has alleged only that she bought

1 a PC, and that somewhere out in ether there was a marketing
2 campaign by Microsoft, without any connection between the two.
3 And so the question is, can you do that? Is that okay?

4 And, to talk about that, Your Honor, I want to march
5 through each of the three causes of action that we are talking
6 about in connection with this motion. Actually, it's two causes
7 of action and one theory that runs through the two, one is
8 Consumer Protection Act, one is unjust enrichment, and one is the
9 theory that goes to Your Honor's question about whether she can
10 sue on an express upgrade theory without actually having herself
11 participated in the express upgrade program.

12 CPA first. We all know, Your Honor, that under Hangman
13 Ridge, long ago, 20 years or so ago, the Washington Supreme Court
14 made clear that Consumer Protection Act claims requires
15 causation. And the court said that that inheres in just nature
16 of the language of the statute. The statute allows someone
17 injured in his or her business or property by a violation of the
18 statute to sue for actual damages. Not restitution, not
19 statutory penalties, but actual damages. And reading that
20 language, the court said a causal link is required between the
21 unfair or deceptive acts, on the one hand, and the injury
22 suffered by plaintiff on the other.

23 There's no causal link of that nature alleged.

24 Plaintiffs try to misdirect this by saying what we're
25 really trying to do is impose a reliance requirement. The

1 interesting thing is, Your Honor, that is a good question, is
2 there a reliance requirement under the CPA. But it's not a
3 question that's even presented by this complaint. Why? Because
4 they make no effort to allege any causal connection. Not
5 reliance, not anything else. They simply allege the purchase of
6 a computer and the existence of some marketing.

7 In talking themselves about what the causation
8 requirement might entail, they cite to pattern instruction
9 3.10.07, the jury pattern instructions. Plaintiff has the burden
10 of proving the defendant's unfair or deceptive act or practice
11 was a proximate cause of plaintiff's injury. Proximate cause, as
12 Your Honor's probably said hundreds of times, means a cause which
13 in direct sequence produces the injury complained of.

14 Your Honor, there's nothing in this complaint suggesting
15 that the unfair or deceptive act or practice of Microsoft in
16 direct sequence caused Ms. Kelley or Mr. Hansen any injury at
17 all.

18 And what's interesting, Your Honor --

19 THE COURT: Can't you extrapolate that the purchase of
20 the machine itself is the injury? In other words, they are
21 basically saying: I bought this thinking it was Vista ready and
22 it's not.

23 MR. RUMMAGE: But, Your Honor, what Your Honor just said
24 just perfectly embodies the flaw in the complaint, they do not
25 allege and they studiously avoid allege saying: I bought this

1 thinking. They just said: I bought this.

2 And if what they had alleged, Your Honor, was: I saw
3 the sticker and I bought this thinking it was Windows Vista
4 Capable, we might have a very different motion. But not in the
5 complaint and not in the opposition do they go that far. They
6 are very, very careful to avoid ever saying that.

7 That's why when I read, Your Honor, the allegation
8 concerning the purchase of the computer by Ms. Kelley, I said
9 full stop, because that literally is it in the complaint in terms
10 of the allegation concerning her.

11 And it's particularly telling, Your Honor, that when
12 they argue this in their papers and they talk about causation,
13 they say that class members -- remember, this isn't a class
14 action yet -- class members received assurances from Microsoft
15 and falsely were led to believe that Windows Vista Capable meant
16 something other than what they got. But they don't allege that
17 Ms. Kelley was. And they don't allege that Mr. Hansen was.

18 THE COURT: Well, it is a fair extrapolation to say
19 class members, if we don't have a class but if they consider
20 themselves part of that group, that the group, you know, that's
21 how they're saying to you we were deceived because we are a
22 member of that class.

23 MR. RUMMAGE: Your Honor, I don't think it is a fair
24 extrapolation, and the reason I don't think it's a fair
25 extrapolation is that they've been given so many opportunities to

1 say it, and they decline to. And these are good lawyers on the
2 other side. They know that if that got them past this motion, it
3 wouldn't be very hard for them to say that. And they've been
4 very scrupulous about avoiding it.

5 I would say, Your Honor, this is a case very comparable
6 to Rolo, which is one of the cases that we cite in our brief, a
7 Third Circuit case. And that's a case that involved alleged
8 deception in not the sale of software or hardware but in the sale
9 of real estate. And the Third Circuit point outs that, look it,
10 they make all these allegations about deception and fraud in
11 connection with the marketing of this real estate, and they
12 allege that people were deceived, and then they allege that we
13 bought the real estate. But they don't allege that middle part
14 for themselves, they don't allege: We were received. The court
15 says: You know, a class action complaint before a class is
16 certified is just an individual complaint and you can't rely on
17 the allegations for the other people; you have to rely on the
18 allegations as to yourself. Because you don't have a personal
19 claim, your claim is dismissed.

20 And I think the same is true here. As I said, Your
21 Honor, it would be easy enough for them to do it, it would have
22 been easy enough for them to say it. But they haven't, and
23 they've studiously avoided it. So, for that reason, Your Honor,
24 we think they have not alleged anything pertinent to causation
25 under the CPA, and therefore it should be dismissed.

1 The unjust enrichment argument is slightly different.
2 But, at some level, it's an argument that follows from the way
3 they've argued this in their opposition. Because the point of
4 their enrichment, what they say was the enrichment to Microsoft,
5 is that Microsoft received -- and I think this is a quote -- more
6 XP licenses and additional upgrades than it would have without
7 the marketing program. So, in other words, it's saying: You
8 were going to sell some XP licenses anyway, you were you going to
9 sell some upgrades, because of the marketing program you sold
10 more. Which is another way of saying: We got one body of people
11 who were going to buy anyway, and then we got another body of
12 people who were induced to buy because of this market. That's
13 the theory. And they say, as to this second group of people,
14 enrichment is unjust.

15 But again, Your Honor, they never say which category of
16 people Ms. Kelley or Mr. Hansen fall into. Were they among the
17 people that were going to buy anyway, or were they among the
18 people who were prompted to buy by virtue of the supposed
19 deceptive marketing campaign? Plaintiffs don't say. And that,
20 under their own theory of what constitutes unjust enrichment,
21 means they haven't alleged unjust enrichment.

22 And that brings me to the final one, which is the
23 express upgrade program, which I think goes right to Your Honor's
24 question about is it a standing issue that's appropriate for
25 class certification or is this a 12(b)(6) issue.

1 I think the standing issue -- let me first explain the
2 argument, and then we'll segue into how that affects the class
3 certification issues.

4 With respect to the express upgrade program, that was a
5 particular feature that the plaintiffs allege in their complaint
6 in paragraph 8.2, and they allege in the complaint that there
7 were certain class members who were subjected to the express
8 upgrade program and the alleged deception associated with that.
9 But they are very careful to say, in two sentences -- the first
10 sentence they talk about what Ms. Kelley and Mr. Hansen did, and
11 in the second sentence of paragraph 8.2 they talk about the class
12 and the express upgrade program. So they have no allegation that
13 these two people participated in that program, and yet they
14 purport to base causes of action upon it. And, Your Honor, that,
15 we believe, too, falls short of stating a claim, any claim,
16 related to the express upgrade program.

17 Now, their response to that goes right to the class
18 issue. They say: Geez whiz, even though we don't have a claim,
19 it's similar to the complains we do have, and we think our claims
20 remain typical of the absent class members. Your Honor, that may
21 be an issue that we get to when we get to class certification.
22 They may try to define the class to encompass people like that.
23 And, that's fine, we'll argue about that then. And I happen to
24 think that we ought to win that argument. But, for today, the
25 argument is not about typicality, it's not about standing, as

1 Your Honor put it. It is about whether these people have alleged
2 the elements of a claim. And, they have not, because they have
3 not alleged the causal connection.

4 Your Honor also referred to the standing. And I think,
5 Your Honor, standing can be raised on a 12(b)(6) motion just as
6 well as the absence of elements of a claim can be raised on a
7 12(b)(6). If the face of the complaint does not show standing,
8 then it's appropriate to resolve that on a 12(b)(6).

9 Now, Your Honor, I think my time is probably nearly up.
10 I think the summary of all of this is that the whole complaint
11 rests on the premise that there was supposedly misleading
12 advertising or marketing in the air, which is a concept that
13 Justice Cardoza used years ago when he said: Negligence in the
14 air will not do, it has to be negligence toward a person.

15 And, here, Your Honor, I would say misrepresentations or
16 deception in the air won't do. They have to show that those
17 misrepresentations or deception affected them, affected their
18 conduct. And, if they don't, they don't have a claim.

19 I couldn't resist going through this whole argument and
20 not referring to Twombly, so I'll close by referring to Justice
21 Suter's opinion in *Bell Atlantic vs. Twombly* where he said: The
22 plain statement required by Rule 8A must possess enough heft to
23 show that the pleader is entitled to relief. And I like that
24 phrase, enough heft.

25 And I think, if you read through this complaint, there's

1 not enough heft to show that Ms. Kelley or Mr. Hansen, if they
2 prove what they allege in the complaint, are going to be entitled
3 to relief. And that, we believe, entitles us to a dismissal
4 under 12(b)(6).

5 THE COURT: Thank you, Mr. Rummage. Mr. Tilden.

6 MR. TILDEN: Your Honor, I have some demonstratives.
7 May I approach the Court?

8 We necessarily are required to over-prepare, and I don't
9 expect I will use all of those.

10 Let me address the Court's initial question directly.
11 And, as a threshold matter, I agree with the next to last
12 statement of my colleague, Mr. Rummage, we have no theoretical
13 objection to the Court's addressing the standing issue as a
14 12(b)(6) matter.

15 THE COURT: Excuse me, Mr. Tilden, did you mean to hand
16 up to me Microsoft's motion to dismiss plaintiff's amended
17 complaint?

18 MR. TILDEN: I did. I believe it's only three pages,
19 annotated by me.

20 THE COURT: Got it. I thought that you were handing me
21 your copy. Go ahead.

22 MR. TILDEN: I gave you the pretty one and kept the
23 Xerox for myself.

24 THE COURT: Okay. Very good.

25 MR. TILDEN: We have no quarrel with the notion as an

1 abstract proposition that standing can be decided as a 12(b)(6)
2 matter. Obviously, the facts would have to be clear, and there
3 would be no conceivable dispute about them. But, were that the
4 case, we don't have a problem with that result.

5 If we could direct the Court to only one case or place
6 to look on the standing issue, we would direct the Court to the
7 *Dukes vs. Welmark* decision, a recent Ninth Circuit case. And
8 *Dukes* relies in large part significantly several times on chapter
9 3.13 of Newberg. And, when you read *Dukes* and when you read
10 Newberg, what you learn is that no named plaintiff need satisfy
11 every element of every cause of action, that there must be some
12 reasonable overlap.

13 We believe there is a reasonable overlap here, and we
14 believe as a 12(b)(6) matter that has got to be decided in the
15 plaintiff's favor today.

16 *Dukes* itself involved -- this was the female Walmart
17 employee case which is still in the Ninth Circuit. *Dukes*
18 involved a contention that a group of named plaintiffs, all of
19 whom were hourly but for one low level salaried employee,
20 couldn't possibly be reasonable representatives of among others,
21 the upper level salaried employee women. And the Ninth Circuit
22 didn't have any problem concluding that wasn't the case.

23 Here, we will show, when the time comes, that the
24 computers bought were the same, that the promise given was the
25 same, that the route that you took to get from your computer to

1 the promise given was slightly different but not materially
2 different.

3 Does this present a question for Mr. Rummage for another
4 day? I suppose it does. But, as a 12(b)(6) matter, we think the
5 law, and in particular the cases in 3.13 of Newberg, pretty
6 handsomely demonstrate that on this motion now we should prevail.

7 I'll address, if it's Twombly/Bell Atlantic briefly, and
8 then move on. The 12(b)(6) standard is not something that --
9 it's not a subject about which I can educate the Court at all.
10 But Bell Atlantic is interesting for this reason. The plaintiffs
11 were intellectually honest in the Bell Atlantic case, and they
12 walked in the court and they said: We believe that a conspiracy
13 has occurred based solely on parallel conduct. And we believe
14 based on the parallel conduct that there must have been a
15 meeting, it must have had attendees, it must have taken place in
16 a physical place and time, and they must have said things back
17 and forth, as a result of which the conspiracy developed. But
18 they had to evidence whatsoever of the meeting. And they did not
19 allege any. And that is why the Bell Atlantic/Twombly by case is
20 7-2. No allegation of the conduct at issue. No conduct alleged.
21 None.

22 We don't have any problem with the Twombly result, and
23 we believe it should have been 9 to nothing.

24 What have we alleged here? We have alleged that
25 Microsoft orchestrated a program, Microsoft designed the sticker,

1 caused it to appear on computers. They went out in to trader
2 commerce, people bought them, and were damaged as a result. We
3 know the computer, we know who did it. We don't know the person,
4 but we know the entity. We know the buyers. We don't know all
5 their names, but we can define who they are. So the tort here is
6 fully alleged. The Twombly tort wasn't alleged at all. So we
7 don't believe there's any teaching on the 12(b)(6) front that's
8 important for the Court here.

9 I would like to talk about Magnuson-Moss and the
10 Consumer Protection Act, and then I'll be quiet. Mr. Rummage
11 said he didn't -- and I'll -- I think it's easier to address
12 Consumer Protection Act first.

13 He said that their brief or their argument did not raise
14 reliance, but then it was all he talked about. No showing that
15 Diane Kelley had read the sticker, that Mr. Hansen understood
16 what the sticker meant, that either of these people went out and
17 did anything. The question for the Court is, is reliance
18 required in Washington on a Consumer Protection Act case?

19 I'll be very brief. One, this issue is in the Supreme
20 Court now in a case called Indoor Billboard vs. Integra Telecom.
21 It has been briefed, it has been argued, and we are awaiting for
22 an opinion. So someone out there is going to let us now
23 definitively at whatever pace the Supreme Court issues a ruling.

24 Two, do we have a sense of what the ruling is going to
25 be? We do. We have five data points that tell us what the

1 ruling's going to be. Every one of them clearly rejects the kind
2 of individual reliance that Mr. Rummage just demanded of us.

3 Picket I, Picket vs. Holland America, these are people
4 that paid \$4,000 for a cruise, and Mr. Rummage would impose on
5 them the requirement that they say: Oh, no, \$25 is too much in
6 port expenses, I want my money back. Division I looked at that
7 and said: You don't have to ask for your money back, you don't
8 even have to know about the expense, you don't have to show any
9 reliance at all. That's Picket I.

10 Robinson vs. Avis Rent a Car system, similar disclosure
11 of a fee at a rent-a-car contract. No individual reliance
12 required. Don't have to read it.

13 Pierce vs. Novastar Mortgage, this is Judge Brian case
14 from 2006, similar result.

15 Stevens vs. Omni Insurance Company, Division I, April of
16 this year.

17 And then *Schnall vs. AT&T*, June 18th of 2007. AT&T
18 involved a uniform or unified connector charge. You get your
19 phone bill, and it's got a zillion entries on it you, and don't
20 know what they all mean. Although, some of them say Tilden
21 called Smith on this day, that part you can figure out. There's
22 a UCC charge on the phone bill. And the argument is that not all
23 of it is a proper charge. AT&T defended saying these people
24 didn't read the bill, they didn't know what a UCC was, they said
25 they didn't care, are you telling me they would have complained?

1 And Division I said you don't have to show any of that because
2 individual reliance isn't necessary.

3 If individual reliance -- incidentally, the Attorney
4 General's Office filed an amicus curiae brief in the AT&T Schnall
5 case, arguing that the Consumer Protection Act would be gutted if
6 individual reliance were necessary. So we have a handy call
7 league in our corner on this very issue.

8 What do we allege on the causation front? Microsoft
9 defined the terms of this market, you're going to get this
10 Windows Vista Capable machine and at some point in time in the
11 future -- and we'll talk about that in a second -- you're going
12 to receive the remainder of this promise. Then they didn't
13 deliver the promised product.

14 Robinson vs. Avis Rent-a-Car says injury and causation
15 are established if the plaintiff loses money because of
16 defendant's unlawful conduct.

17 Well, every plaintiff in this class and both -- punitive
18 class and both named plaintiffs have lost the benefit of their
19 bargain because they do not have what Microsoft told us we would
20 get. The Windows Vista Capable boxes we have deliver by one
21 pedigree count zero of 17 important Vista features. 0 for 17.

22 Every trade or commerce event involves an exchange of
23 the form of bird in the hand is worth two in the bush. Or two
24 birds in the hand is worth three in the bush. In the hidden fee
25 cases, the argument is I gave you two birds, the basic cost for

1 the cruise and the extra 25 bucks, for the bird or two in the
2 bush, and I should have only given you one bird.

3 Here, the contention is we delivered our bird in the
4 hand, the money, and we should have gotten two in the bush, we
5 should have gotten a box and a box that was upgradeable to the
6 real Vista. We did not get the second bird in the bush. That is
7 a benefit of the bargain damage, it's real, every class member
8 got it or sustained it, and we sustained it because Microsoft did
9 not deliver it.

10 The Magnuson-Moss Act question, Your Honor, is a fun
11 one, as a legal proposition. If we were in law school, sitting
12 around talking about what we'd learned today, this might be first
13 on our list. I've got a hand-out here of the statutory language,
14 and I'd like to go through it real kick.

15 THE COURT: Can you focus real quick, Mr. Tilden?

16 MR. TILDEN: No, is the answer.

17 THE COURT: Have you given that in the packet to me?

18 MR. TILDEN: Yes.

19 THE COURT: I see. Thank you.

20 MR. TILDEN: Have I done better here?

21 THE COURT: Yes, you have.

22 MR. TILDEN: What does the law require? Any written
23 affirmation of fact. We make no apology for the fact that this
24 warranty does not look like most. Most warranties look fancy
25 because, we hypothesize, the manufacturer wants to charge more

1 money for the warranties. This warranty doesn't look like most,
2 but does it satisfy the parameters of the act? Yes. Any written
3 affirmation of the fact that a computer is Windows Vista Capable
4 of an affirmation of fact. Made in connection with a sale of a
5 product, consumer product. A personal computer is a consumer
6 product. By a supplier to a buyer. No dispute. Which relates
7 to the nature of the material or workmanship. Well, Windows
8 Vista Capable relates to the nature of the computer. Affirms or
9 promises that such material or workmanship is defect-free or will
10 meet a specified level of performance. What Microsoft is telling
11 us -- and we'll get to this in detail on the next page or the one
12 after -- from the date of purchase, this machine is capable of
13 running Microsoft's new Vista operating system when it's
14 released, that refers to a specified level of performance. The
15 specified period of time is the date of purchase through Vista's
16 release.

17 What have we heard here? We've heard that we don't
18 satisfy 16 CFR 700.3, a written affirmation of fact or a written
19 promise of a specified level of performance must relate to --
20 doesn't say identify, it doesn't say include two dates, it only
21 says relate to -- a specified period of time.

22 Microsoft has told us in their response to our requests
23 for Admission No. 43, and I've attached the response behind
24 this -- Microsoft admits only that Windows Vista Capable logo was
25 intended in part to encourage consumers not to delay their

1 purchases of new PCs until their release. They have identify the
2 period of time, from the date of purchase until the release.

3 Let's go to the sticker and let's analyze the question
4 that has to be resolved on a 12(b) motion. What does the sticker
5 mean?

6 There's an example in the Microsoft brief, and I'd like
7 to begin with that.

8 How much time do I have left, Your Honor?

9 THE COURT: You have about five more minutes.

10 MR. TILDEN: Okay. I'll finish on time.

11 The example they use is one --

12 THE COURT: I'm sorry, Mr. Tilden, you've got eight
13 minutes left here.

14 MR. TILDEN: They take an example from I believe the
15 CFRs, a refrigerator has an energy efficiency rating of 10.0, is
16 that a warranty. No. Well, let me back up. It's a warranty.
17 Is it a Magnuson-Moss warranty? No, it's not. It makes no
18 future promise at all. If the refrigerator that is the subject
19 of this statement degrades tomorrow and now has an energy
20 efficiency rating of 9.0 tomorrow, does that contradict the
21 statement made? No. If it breaks tomorrow, does it contradict
22 the statement made? No. If refrigerator state-of-the-art
23 changes tomorrow and suddenly an energy efficiency rating of 20.0
24 is what everybody wants, does this contradict the statement made?
25 It doesn't.

1 Microsoft's statement here, Windows Vista Capable. Your
2 Honor, in order to address the question on a 12(b)(6) motion
3 whether or not this statement a Magnuson-Moss Warranty, we have
4 to know what the words mean. Microsoft, for starters, needs to
5 tell us everything it thinks the words mean. Microsoft has
6 studiously avoided telling us what it believes the words mean.

7 For purposes of a Magnuson-Moss warranty analysis, the
8 Court has to impute to these words everything that a reasonable
9 person would impute to them. Nothing unreasonable, but
10 everything that a reasonable person would impute to them.

11 What are the things that a reasonable person would
12 impute if you got a computer with a sticker on it that says
13 Windows Vista Capable?

14 First thing you would assume is that the computer will
15 run Vista when it is released. We believe any reasonable
16 purchaser would think that.

17 The second thing you're going to assume is that,
18 whatever Windows Vista is, it's coming out pretty soon. People
19 wouldn't put a sticker on it if it were coming out in 2017.
20 That's especially the case in the computer field. I don't know
21 anything about computers, and I think I've told the Court that
22 before. And, if I haven't told you, I'm sure I've demonstrated
23 it in the courtroom. I have had the experience of trying to take
24 my computer to both the school district and Good Will. One of
25 them told me they didn't want it because of the elements in it,

1 the other told me they didn't want it because it was obsolete and
2 they had no use for it. So I took my hard drive, the box, and I
3 threw it in the garbage. No one wanted my computer. More's law
4 had made my computer obsolete; it would not run the games my
5 children wanted.

6 THE COURT: And Mayor Nichols might not like the fact
7 that you did that.

8 MR. TILDEN: Not my first sin.

9 And I threw it in the garbage a long time ago. But I
10 did throw it in the garbage.

11 Everyone's fear with their computer is they'll become
12 obsolete. Windows Vista Capable is telling you that, whatever
13 Vista is, it's going to come out at some point before your
14 computer is obsolete and some point reasonably soon. Could
15 Microsoft encourage OEMs to put this sticker on a computer and
16 then announce that Vista was coming out ten years from now? No.
17 Could they announce Vista was coming out in a week? Sure. Where
18 between a week and ten years is the line? I don't know, that's
19 why we have courts. But there is a time content to this sticker
20 that is not present on the face of the words, and any reasonable
21 person would interpret it that way.

22 The last one is the point, though, that's most important
23 for us. Between the date of purchase and the date of release of
24 Vista, this computer will not be rendered obsolete by losing its
25 Vista capability. That is the promise made here. And the way we

1 know that is inherent in this statement is this. Assume that the
2 period is four months that a plaintiff buys -- both plaintiffs,
3 every member of the class -- bought their computer on day 1, and
4 Vista's released on day 120, or would have been. All the
5 computers on day 1 have this sticker. If Microsoft on day 60
6 announced that they have an even better, neater, cooler Vista
7 that's going to come out instead, because they've been working
8 real hard and they're all really smart, but it requires twice as
9 much RAM and a different box, could Microsoft do that? Well,
10 they can do it. Would it be a tort? Sure. Because they've
11 already flooded the market with people who own this box and have
12 been told their computer is Windows Vista Capable.

13 And it is that promise that Microsoft has breached here.
14 That is the warranty, the promise that your box will remain
15 Windows Vista Capable throughout that period, and that's the
16 breach.

17 Let me check my notes, I think I'm done.

18 (Pause in Proceedings.)

19 MR. TILDEN: I am done, Your Honor, with one comment. A
20 portion of the Microsoft attack is directed at our theories or
21 the underlying facts. A portion of it, however, is directed at
22 the words in the complaint. I won't take the Court through the
23 words in the complaint, but we believe each theory is thoroughly
24 pleaded in there, and I'm happy to address that at any length the
25 Court wishes.

1 THE COURT: Thank you, Mr. Tilden.

2 Mr. Rummage, rebuttal.

3 MR. RUMMAGE: So much to say, so little time. I have
4 three main points, Your Honor.

5 First of all, I'd like Your Honor to disregard what Mr.
6 Tilden handed up, because obviously some of what he handed up are
7 recent discovery responses, outside the pleadings, outside the
8 scope of the 12(b)(6). It would have been just as improper for
9 Your Honor to get from me a copy of the discovery responses we
10 received yesterday which some of which bear upon our arguments
11 here.

12 THE COURT: I'm not sure exactly what you are --

13 MR. RUMMAGE: In particular, Your Honor, the first page
14 was produced in discovery, the response to the request for
15 admissions were produced in discovery.

16 THE COURT: You mean, the sticker itself? I shouldn't
17 look at the sticker itself?

18 MR. RUMMAGE: I don't have an objection to the sticker
19 itself.

20 MR. TILDEN: It's requests for admitted No. 43, Mr.
21 Rummage has a legitimate point. I got -- I forgot all about we
22 were here on a 12(b)(6) motion. It's request for admission No.
23 43, that's a fair observation.

24 THE COURT: Well, that's not one of the things -- hold
25 on. What I looked at is what does the statement mean. I'm

1 assuming that's pure argument of Mr. Tilden's.

2 MR. TILDEN: Correct.

3 THE COURT: And I looked at Magnuson-Moss Act statutory
4 analysis, and I'm sure that's pure argument on the part of Mr.
5 Tilden.

6 MR. RUMMAGE: Right.

7 And the next page, Windows Vista Capable relates to a
8 specified period of time as a response to requests for admission
9 as the centerpiece.

10 MR. TILDEN: We'll withdraw that.

11 MR. RUMMAGE: I don't know whether Your Honor intended
12 to take those back to chambers, but some of the other materials
13 in that stack are discovery materials.

14 THE COURT: All right. Well, we'll limit ourselves to
15 the sticker and the two argument pages.

16 MR. RUMMAGE: Outstanding.

17 So, with that, Your Honor, let me respond on the
18 Magnuson-Moss claim, and I don't think it takes very long.
19 Because the one word that Mr. Tilden didn't underscore and that
20 he kept dancing around was the word specify. It's not just that
21 it has to promise performance over a period of time, it has to
22 promise performance over a specified period of time. That's an
23 important word. Congress didn't put those words in there by
24 accident. There's no period of time specified in those three
25 words. Mr. Tilden can tease it out, but you can equally tease

1 out period of time in any of the other examples he gave,
2 including an efficiency rating for a refrigerator which the FTC
3 specifically says is not a warranty.

4 THE COURT: Mr. Rummage, Mr. Tilden argues that you take
5 the sticker and you put it on the computer, and that the -- and,
6 if I understand his argument correctly, the combination of the
7 two make the statement. In other words, you don't put it on
8 something that's going to be obsolete in X amount of time.

9 MR. RUMMAGE: Nor would you put an efficiency rating on
10 a refrigerator that will not have that rating tomorrow. And that
11 was the example he gave, Your Honor. If Your Honor agrees
12 with -- I'm sorry to interrupt.

13 THE COURT: He uses the example refrigerator has energy
14 efficiency rating of 1.0. That's a pure statement. Either it
15 does or it doesn't.

16 MR. RUMMAGE: So too, Windows Vista Capable is a pure
17 statement, either it is or it isn't at the moment in time it's
18 given. Both of those statements have exactly the same temporal
19 quality. When I buy the refrigerator, Your Honor, I could
20 care less whether it has that efficiency rating as it sits on the
21 retailer's floor, I want to know if it's going to have that
22 efficiency rating when it's in my house.

23 THE COURT: That's the problem, isn't it? Because, at
24 the time these were purchased, Vista wasn't out.

25 MR. RUMMAGE: My point is, they are two sides of the

1 same coin. If Your Honor says that this is a promise of
2 performance over a specified period of time, so too is the
3 performance standard with respect to the refrigerator that the
4 FTC specifically has said is not. Why? Because it doesn't have
5 a specified period of time. Maybe we all can think about what in
6 common sense the period of time might be, but the statute doesn't
7 say that. The statute says a specified period of time. And so,
8 if the retailer or manufacturer does not specify the period of
9 time, under the statute, it just doesn't fall within.

10 And, again, I go back to the point of what the Seventh
11 Circuit was saying on this, which is you need a bright line rule
12 so that people know whether to comply with the act or not. And,
13 if it's not going to be a specified period of time, there's a lot
14 of people out there in a world of confusion.

15 THE COURT: The only question I have for you here, Mr.
16 Rummage, is that, can the specified period of time be taken from
17 the context?

18 MR. RUMMAGE: No, Your Honor, because that's not
19 specified. Then it becomes a contextual inference, implication,
20 however one wants to look at, but it is not specified. Specified
21 means it says the period of time. And that, I believe, is
22 exactly what Skeleton says in the Seventh Circuit opinion. And I
23 believe that's exactly what the FTC is getting at. And it would
24 not be a bright line rule, Your Honor, if it were something that
25 one could tease out of the circumstances. So it seems to me that

1 it's answered on the face of the statute.

2 What I would like to now briefly turn to, and I guess I
3 have probably 10 seconds left at this juncture, but the question
4 of causation. I think it's important to understand that Mr.
5 Tilden again is trying to recast what we argue. We are not
6 arguing reliance. I happen to believe, as the person who argued
7 Picket I and Picket II, that my data points of what the supreme
8 courts intends to do about this are pretty decent. And I believe
9 at the end of the day they will stick with causation as we have
10 described to Your Honor today. And that means that reliance can
11 establish causation. The Court typically in dodging this
12 question in the past in Picket II has left open the possibility
13 that there may be some other way to establish causation. But Mr.
14 Tilden hasn't come forward with what that other way might be.
15 What he said to Your Honor is: Here's what we say about
16 causation. And he said: Microsoft promised this, promised that
17 it would run Vista, and it doesn't run Vista, and that was the
18 benefit of the bargain.

19 That's not the way the Consumer Protection Act works.
20 That's the way it a breach of contract claim works, which they
21 have withdrawn. Benefit of the bargain damages are an alien
22 concept.

23 Here, they have alleged that we did have a marketing
24 campaign about Windows Vista. They have alleged that we had
25 plastered on the web the fact that different experiences were

1 associated with different versions of Windows Vista at different
2 price points, and they have alleged they bought a PC. That is
3 not something that pushes this claim across the threshold. It's
4 not something that gives it heft, because they do not have
5 embedded within those allegations anything to suggest that these
6 individuals were responding to something that turned out to be
7 false or misleading. They just say they bought a computer. And,
8 as Your Honor sits there today and reads that complaint, Your
9 Honor has no idea whether they bought a computer because they
10 needed one and this is the computer they wanted, or whether they
11 thought it was going to be a Windows Vista Capable and that
12 Windows Vista Capable meant that not just that it could run
13 Vista, because Your Honor knows and they have conceded it runs
14 Vista, but that it doesn't run the version of Vista that they
15 wish it did. That's the gist of the complaint.

16 And, indeed, when one looks at the web site, there's no
17 other way to characterize it. Because the web site makes clear
18 that there were different versions of Vista with different
19 experiences associated with it.

20 Without them alleging, Your Honor, that there was some
21 link between something we did that was wrong or misleading or
22 deceptive, they are not entitled to be in this court, taking up
23 Your Honor's time or taking up our time. They need to allege
24 that there is a connection, a causal link between the conduct at
25 injury.

1 With that, Your Honor, we ask the Court to dismiss under
2 12(b)(6). Thank you.

3 THE COURT: All right, counsel, I know that we have very
4 carefully -- and I know I hammered on you very hard -- to come up
5 with a very strict timeline for how fast you have to do things.
6 So I am going to rule partially from the bench today so that you
7 understand where this is going.

8 First of all, on the issue of what I call standing or
9 whether each individual plaintiff must come under the same set of
10 facts, that is an issue for your certification. And I'll revisit
11 that issue when we have that then.

12 Turning to the Consumer Protection Act claim, which is a
13 state claim, I'm much more familiar with the whole series of
14 cases coming out of the state court, and obviously we've all
15 followed them since Hangman Ridge. And I believe that the
16 plaintiffs, using the very minimal pleading standards in these
17 circumstances, have pled enough. And that, if I am a betting
18 woman, I am assuming that the Supreme Court is basically going to
19 say you go in and buy a computer and you don't specifically have
20 to say that you were deceived by this particular fact. And,
21 therefore, their act of purchase covers their reliance and their
22 causation.

23 As to the Magnuson-Moss Act, I'm going to need to go
24 back and take a look at the cases, keeping in mind your
25 arguments. I'm not ready to tell you where I'm coming out on

1 that.

2 The area that I have the most problems with is the point
3 in time, and that's where I need to go back and read the case and
4 see where we are. It's not a statute that comes up all the time
5 for me, so I need to take a look carefully at that time.

6 As to the unjust enrichment, that also survives as a
7 claimed statement of what happened and the result, and I believe
8 that that is all that's necessary to move us along.

9 So, as to the Magnuson-Moss Act, you should look for a
10 written opinion on that issue probably in about two weeks. But I
11 think that the other rulings should keep you chugging along, or
12 is that a problem of bifurcating them in that way?

13 MR. RUMMAGE: No, Your Honor.

14 MR. TILDEN: None here.

15 I take very seriously Mr. Rummage's point regarding the
16 hand-out is an excellent one, and I would like the opportunity to
17 clean those up, and I'm happy to do that now.

18 THE COURT: Okay. We'll give you those back, and how
19 about if you just take the pages that are remaining, and those
20 will be the only ones that we'll look at or consider. And we'll
21 move on from there. And I obviously will limit myself to the
22 pleadings themselves and what's here.

23 Now, how are you coming on everything else? Are things
24 moving along, are you on your timetable?

25 MR. TILDEN: So far so good, Your Honor. Is that fair?

1 MR. RUMMAGE: I think that's basically right, Your
2 Honor.

3 THE COURT: Okay. Don't wait until things go south
4 before you come tell me that there's a problem.

5 MR. RUMMAGE: They have not gone south, that's for sure.

6 THE COURT: All right. Because I'd much rather have you
7 come tell me, and have me be part of helping you work it out,
8 than telling me after the fact. Asking permission is better than
9 pleading for forgiveness; okay? Have a nice evening.

10 (5:06 p.m., Proceedings Concluded.)

11

12 CERTIFICATE

13

14

15 I, Susan A. Zielie, Official Court Reporter, do hereby
16 certify that the foregoing transcript is correct.

16

17

18 /S/ SUSAN A. ZIELIE, RPR, CCR

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Susan A. Zielie, RPR, CCR

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